80-1587

No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1980

SAFEWAY STORES, INC.,

Petitioner

v.

DANIEL CRESPIN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March, 1981

QUESTION PRESENTED FOR REVIEW

Whether the evidentiary burden imposed upon the employer by the Court of Appeals is inconsistent with this Court's recent decision in *Texas Department of Community Affairs v. Burdine,* ..... U.S. ..... (No. 79-1764, decided March 4, 1981), in that the Court of Appeals required petitioner to prove, rather than solely to explain, the non-discriminatory reasons for its decision to hire someone other than the respondent.

LIST OF PARTIES

1. The Petitioner is Safeway Stores, Incorporated, a Maryland corporation with its principal place of business in Oakland, California.[1]

2. The Respondent is Daniel Crespin of Denver, Colorado.

3. In the trial court, the Equal Employment Opportunity Commission was the named plaintiff and certain labor unions were named as party defendants under Rule 19(a)(2) of the Federal Rules of Civil Procedure. However, neither the EEOC nor the labor unions participated in the proceedings below and they are not parties to this proceeding. The following is a complete list of the Rule 19(a)(2) defendants:

Retail Clerks Union, Local No. 7

Butcher Workmen of North America, AFL-CIO, Local No. 634

The International Union of Operating Engineers, Local No. 1

Delivery Drivers, Warehousemen and Helpers, Local Union No. 435

Milk Drivers and Dairy Employees Local No. 537

Warehouse and Distribution Employees Union, Local No. 452

Bakery Wagon Drivers and Salesmens Local Union No. 219

District Lodge No. 86, International Association of Machinists and Aerospace Workers

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[1]Safeway has no subsidiaries or affiliates.

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v.

DANIEL CRESPIN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Safeway Stores, Incorporated hereby respectfully petitions for a writ of certiorari to review the decision in this action rendered by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Tenth Judicial Circuit is reported at 634 F.2d 1273 (10th Cir. November 17, 1980).

JURISDICTION

The Judgment of the Court of Appeals was entered on November 17, 1980. A Petition for Rehearing was timely filed and denied on December 17, 1980. Jurisdiction is predicated upon 38 U.S.C. § 1343 and 42 U.S.C. § 2000(e) *et seq;* 28 U.S.C. § 1254.

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*

STATEMENT OF THE CASE

Proceedings Below

This Petition has resulted from a decision rendered by the Tenth Circuit Court of Appeals remanding this case for modification of a damage award to be entered in favor of the Respondent. The following is a brief outline of the procedural background.

On November 5, 1975 the Equal Employment Opportunity Commission ("EEOC") filed a complaint against Safeway Stores, Incorporated ("Safeway") in the United States District Court for the District of Colorado pursuant to Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"). The EEOC later amended the complaint to add certain labor unions as party defendants under Rule 19(a)(2). The amended complaint alleged that Safeway had engaged in certain unlawful employment practices in violation of Title VII in its manufacturing, distribution and retail operations in the Denver, Colorado metropolitan area.

On September 29, 1976, the EEOC, Safeway, and the Rule 19(a)(2) defendants entered into a Consent Decree in which all issues raised by the EEOC were resolved without further litigation. The Consent Decree provided for certain affirmative relief and set forth a procedure for the resolution of individual charges of employment discrimination previously filed and still pending before the EEOC. On November 5, 1976, pursuant to the procedure thus established, the district court appointed a Master to hear such claims.

In accordance with the Consent Decree and the Order of Appointment, a notice was sent to each individual who

had filed a charge of employment discrimination prior to the entry of the Consent Decree and whose charge concerned a Safeway facility covered by the Consent Decree. Claimant-Respondent Daniel Crespin ("Crespin") elected to submit his charge to the Master for resolution. In the claim form which he returned, Crespin alleged that Safeway had discriminatorily failed to consider him for employment as a carpenter in March, 1974 because of his national origin, Spanish-surnamed American.

Crespin's claim was heard by the Master on February 7, 1977. In a report filed with the district court on October 11, 1977, the Master recommended the finding that Safeway had violated Title VII when it refused to consider Crespin for employment as a carpenter. The district court adopted those findings by Opinion and Order dated November 16, 1977.

On March 31, 1978 the Master conducted a remedial hearing concerning Crespin's claim and filed his report with the district court on August 21, 1978. The Master recommended Crespin's instatement in Safeway's next available carpenter's position with seniority and full back pay commencing on March 11, 1974. The district court subsequently reduced Crespin's entitlement to seniority and back pay benefits to a period commencing June 20, 1977. Judgment was entered accordingly on November 22, 1978. The Tenth Circuit Court of Appeals affirmed the trial court's judgment, with modifications increasing the amount of the award.

Statement of the Facts

From 1967 until 1977, except for a brief eight month interval in 1974, Safeway employed one carpenter in its Denver Division. Safeway's carpenter works without supervision and is responsible for various carpentry work and maintenance duties at Safeway stores in a six state region.

His job includes the design and construction of custom cabinets, display cases, and other items to meet the needs and requests of individual Safeway store managers and other supervisory personnel. In addition he is often called upon to resolve specialized maintenance problems not within the expertise of a store's regular maintenance staff. Thus, the person holding this position must be an experienced carpenter capable of responding to the individual and varied needs of many specific store managers in a timely fashion and with no direction, supervision or assistance.

Since at least May 1, 1972, the carpenter's position has been governed by a collective bargaining agreement between Safeway and the Carpenter's District Council of Denver and Vicinity ("the contract"). Under the contract, Safeway must permit the union to furnish carpenters from a referral list for any job opening which might occur. Alternatively, Safeway may request by name any union carpenter registered with the union office who has performed carpentry work for at least 30 days in the previous year in the employ of a union contractor.

This case arose as a result of a vacancy in the carpenter's position created when Manfred Noble, Safeway's only carpenter, reached retirement age in late 1974. Recognizing the need to familiarize Noble's replacement with the specialized duties of a Safeway carpenter, Mr. James Schlosser, the manager of Safeway's Design and Construction Department, received authorization to hire Noble's replacement early in 1974. On March 11, 1974 Joseph Chambers ("Chambers") was hired for this position. It is this opening to which Crespin's claim relates.

Chambers, the individual hired to fill the carpentry position, had worked as a carpenter for approximately 38 years, his entire working life. His extensive and varied

experience included performing rough and custom carpentry and cabinet work, teaching at carpentry school, and supervising various types of construction, remodeling, and other carpentry projects.

Crespin had been a Safeway employee since 1962 and had worked as an order selector and forklift operator at Safeway's Denver Division Distribution Center. Crespin had performed carpentry work primarily as a hobby although, prior to 1972, he had occasionally performed carpentry work part-time for pay.

In 1969, Crespin advised the superintendent of Safeway's Distribution Center of his wish to obtain a carpenter's position with Safeway. Crespin's interest in the carpenter's position was communicated to Schlosser in 1973. At approximately the same time, an Anglo applicant indicated to Schlosser that he had similar interest in the position. Schlosser was unable to consider either Crespin or the Anglo applicant for the 1974 opening because neither was eligible for referral under the union contract. Had either Crespin or the other applicant been considered for the carpenter's position, Chambers would have been hired in any event on the basis of his superior qualifications.

Crespin did not join the Carpenter's Union until June of 1977, after seeing a bulletin posted by Safeway advertising a second opening for a carpenter's position. Safeway interviewed approximately twelve applicants for the 1977 opening, including Crespin. Mr. Rich Lincolnheil, a professional carpenter with approximately 25 years of full-time carpentry experience, was hired for that position. Crespin has not alleged that Safeway's refusal to hire him for the 1977 opening was in any way discriminatory.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS v. BURDINE,* (No. 79-1764, March 4, 1981).

A. *The Court of Appeals Erred by Requiring the Employer to Prove the Existence of Non-discriminatory Reasons for Failing to Hire the Respondent.*

This Court made it clear in *Texas Department of Community Affairs v. Burdine,* ..... U.S. ..... (No. 79-1764, argued December 9, 1980, decided March 4, 1981), that when the plaintiff has proved a *prima facie* case of discrimination, the defendant bears only the burden of explaining clearly the non-discriminatory reasons for its actions. (Slip Opinion, p. 11).

In the case at bar, the Court of Appeals required Safeway to *establish* that its reasons for failing to hire Crespin were persuasive. In particular, it placed the burden of persuasion on Safeway's shoulders to demonstrate that it acted without discriminatory animus. The opinion specifically holds:

> Safeway then has the burden of establishing that the failure to hire was for a reason other than membership in the affected class. . . .

634 F.2d at 1280.

This is a more onerous burden than that enunciated in *Burdine.* In fact it is essentially the same burden imposed by the Fifth Circuit and reversed by this Court in the *Burdine* decision. There, as here, the Circuit Court had erred in requiring the defendant "to introduce evidence

which, in the absence of any evidence of pretext, would *persuade* the trier of fact, that the employment action was lawful." (Slip Opinion at p. 9, emphasis in original). This Court held that such a burden "exceeds what properly can be demanded to satisfy a burden of production." (Slip Opinion at p. 9).

The Court enunciated the applicable evidentiary standard as follows:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the Court that it was actually motivated by the preferred reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

(Slip Opinion at p. 6).

This Court then further explained the plaintiff's evidentiary burden:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.

(Slip Opinion at p. 7).

In the case at bar, the Tenth Circuit did not, of course, have the benefit of this Court's opinion in *Burdine*,

which was not issued until March 4, 1981. However, the Court of Appeals' decision cannot be allowed to stand in light of the *Burdine* holding.

B. *Petitioner Explained, But the Court Ignored, the Legitimate Non-discriminatory Reasons For Its Actions.*

1. *Safeway's Compliance With Its Obligations Under a Union Contract.*

Safeway articulated two separate legitimate non-discriminatory reasons for Crespin's failure to receive the carpenter's position. First, Safeway established, and Crespin did not deny, that in 1974 he was ineligible for hire under the collective bargaining agreement between Safeway and the Carpenter's District Council of Denver and Vicinity. Safeway did not consider or hire Crespin for the 1974 carpenter position because to have done so would have been in violation of the contract between Safeway and the Carpenter's Union.

Safeway was bound by the contract to follow either the "list referral" or the "name referral" procedure for hiring carpenters. Under the "list referral" procedure, the carpenter on the Union's referral list who had been unemployed longest would have been referred first by the Union. Under the "name referral" procedure, the company could request a particular carpenter by name as long as that carpenter had been employed by a union contractor for at least 30 days during the previous year, regardless of his position on the referral list.[2]

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[2]The relevant provisions of the contract in effect from May 1, 1972 through April 30, 1975 are found in Article 7, Hiring Procedures:

(A) The Employer agrees that he will give the Union the first opportunity to furnish, and the Union agrees to furnish, all classes of employment that are provided for in this Agreement if workers are available for referral, except as referred to in paragraph (H) of this Article. (footnote continued page 9)

Safeway was thus bound by its contract to follow one of two procedures in filling the 1974 carpenter's position. Crespin admits that he was not on the referral list or a member of the Carpenter's Union in March 1974. Had Safeway hired Crespin for the 1974 opening, Safeway would have violated the hiring provisions of its Union contract. Safeway's contractual obligation to comply with its collective bargaining agreement is a legitimate non-discriminatory reason for its refusal to hire Crespin.

Other courts have held that Title VII does not require an employer to act in contravention to a collective bargaining agreement with which it is obligated to comply by reason of other federal labor statutes. In *Sears v. Santa Fe Railway Company,* 454 F. Supp. 158 (D.C. Kans. 1978), the court held that no violation of Title VII existed where the railroad had followed the terms of the collective bargaining agreement as required by the Railway Labor Act. In the *Santa Fe Railway* case, the collective bargaining agreement prohibited unilateral transfer of plaintiffs to other positions for which they were qualified. The court held that the railroad's compliance with the labor contract constituted a legitimate non-discriminatory reason for the railroad's action and provided an adequate response to a *prima facie* case of employment discrimination. The court's reasoning, equally applicable here, was as follows:

> Congress has throughout the years created a number of structures and systems governing numerous facets of labor relations. One such structure, Title VII, is designed to prohibit and eliminate racial

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(H) The Employer signatory to this Agreement shall have the right to request by name a job applicant who is registered with the referral office, who within the past one year immediately preceding the job order, performed work of the type covered by this Agreement, for a period of not less than 30 working days, in the area of the Carpenters' District Council of Denver and Vicinity for a contractor signatory to this Agreement.

> and other discrimination in employment, while RLA [Railroad Labor Act] is one of the structures designed to promote the orderly management of labor through collective bargaining. Both purposes are important, and neither statute repeals the other . . . . The agreement is not discriminatory on its face, nor is there any evidence that the intent of the BSCP in entering into the agreement was discriminatory . . . . This collective bargaining is important under and is protected by the RLA. We refuse to find that Title VII required defendant Santa Fe to act in contravention of the agreement, and therefore hold the Feb. 7 agreement is a legitimate non-discriminatory reason for Santa Fe's failure to unilaterally transfer or promote the plaintiff class members to the brakeman positions for which they were as a class qualified. We further hold that the Santa Fe followed the terms of the agreement because it was required to by the RLA, and not as a pretext (Insert added.)

454 F. Supp. at 181-2.

Similarly, in *Emporium Well Company v. Western Edition Community Organization,* 420 U.S. 50 (1975), the Supreme Court held in a different context that the right to be free of discrimination cannot be pursued at the expense of the orderly collective bargaining process contemplated by the National Labor Relations Act.

Crespin does not claim, and the evidence in the record does not establish, that Safeway's contract with the Carpenter's Union is discriminatory on its face or that the parties entered into the agreement with discriminatory intent. Safeway's obligation to comply with the contract is one legitimate non-discriminatory reason for its failure to hire Crespin for the 1974 carpenter's position. A second

non-discriminatory reason was also shown by the evidence presented.

2. *Safeway's Selection of A Better Qualified Candidate*

Safeway's second non-discriminatory reason for its failure to hire Crespin was that Chambers, the man actually hired for the 1974 position, possessed qualifications clearly superior to Crespin's. This conclusion is thoroughly supported by evidence in the record and there is no evidence or finding to the contrary.

Under the prevailing law, Safeway is entitled to hire the applicant best qualified for the position, irrespective of whether Crespin met the *minimal* qualifications of the job (which Safeway does not admit). In *Teamsters v. United States,* 431 U.S. 324 (1977), the Supreme Court found:

> Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: *an absolute or relative lack of qualifications* or the absence of a vacancy in the job sought. (Emphasis added) 431 U.S. at 358, n. 44.

McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973). See also *East Texas Motor Freight v. Rodriguez,* 431 U.S. 395, 403, n. 9 (1977);

The superior qualifications of the person actually hired, promoted, or transferred is a legitimate non-discriminatory reason for the employer's refusal to hire another applicant. In *Chalk v. Secretary of Labor,* 564 F.2d 764 (D.C. Cir. 1977), *cert. denied* 435 U.S. 945 (1978),

the Court stated: "The purpose of Title VII was to eliminate discrimination, not to force management to accept less qualified or unqualified employees." 565 F.2d at 768, n. 3.

The evidence in the record clearly establishes that Safeway's policy is to hire the person best qualified for the job. Therefore, even if Crespin had met the union referral requirement, his application would have been rejected for a separate legitimate non-discriminatory reason. That is, Crespin's qualifications were markedly inferior to those of the applicant actually hired for the position.

It should be noted here that, in light of this Court's decision in *Burdine,* Safeway need not have proved that Chambers was *better qualified* than Crespin. "Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." (Slip Opinion at p. 11). Therefore, even if Crespin had been able to prove that he was as qualified as Chambers for the position (which cannot be established by the evidence in the record), Safeway would still have been entitled to hire Chambers over Crespin so long as the selection was not motivated by discriminatory animus. As this Court explained:

> The views of the [Fifth Circuit] Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a while male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria.

Slip Opinion at p. 11.

The Court of Appeals' decision is in conflict with the holding in *Burdine* because it requires an employer to hire a minority applicant as long as he or she is *minimally qualified,* regardless of whether another candidate is equally or better qualified. In a footnote regarding the respective qualifications of Crespin and Chambers, the Court of Appeals observed: "The weight which the trier of fact gave to the evidence of these qualifications is not, however, in issue here, since there was evidence that Crespin was also qualified." 634 F.2d at 1281, note 4. The Court of Appeals has thus implicitly concluded that hiring a better qualified applicant is never a defense when the claimant is also qualified. Such a conclusion overlooks a long line of authority, including the decision of the U.S. Supreme Court in *Teamsters v. United States,* 431 U.S. 324 (1977), where this Court found that "an absolute or relative lack of qualifications" was a legitimate reason for rejecting a job applicant. 431 U.S. at 358, n. 44.

3. *The Court of Appeals Improperly Ignored Safeway's Explanation of the Reasons for Its Actions*

The Court of Appeals never even considered Safeway's explanation of the legitimate non-discriminatory reasons for its personnel decisions. Instead, the Court of Appeals seemed to assume the existence of discrimination by the mere fact that Safeway had previously entered into a Consent Decree with the EEOC. Indeed the Court of Appeals blantantly stated: "So it is not quite the situation of the ordinary lawsuit in which the parties are writing on a clean slate." 634 F.2d at 1280. Despite the Court of Appeals misapprehension, a Consent Decree is clearly a settlement without any acknowledgment of discrimination. Indeed, the Consent Decree expressly stated that it "shall in no manner be construed either as an admission by the company of any past discriminatory practice or waiver by the EEOC of

any of its contentions herein. . . ." For the Court to assume discrimination under the facts of this case by reason of its having been filed under a Consent Decree is to contravene the very notion of settlement by consent without an admission of liability.

Perhaps it is because the Court of Appeals assumed the existence of discrimination that it went on to say in its decision that "Safeway offered no reason for this course of conduct. It did not really articulate any reason" for its actions. 634 F.2d at 1283. In making that statement, the Court of Appeals simply ignored the two legitimate non-discriminatory reasons clearly articulated by Safeway in explanation of its decision to hire Chambers instead of Crespin.

Thus, the Court of Appeals' disregard of the applicable evidentiary burdens in Title VII actions conflict with this Court's reasoning in *Burdine:*

> The defendant need not persuade the court that it was actually motivated by the proffered reason. See *Sweeney, supra,* at 25. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. . . . If the defendant carries this burden of production, the presumption raised by the *prima facia* case is rebutted, and the factual inquiry proceeds to a new level of specificity.

(Slip Opinion at pp. 6-7) .

The "new level of specificity" referenced in *Burdine* is the inquiry into the ultimate question of whether defendant's actions were motivated by an intention to discriminate. In order to prove discriminatory motive, plaintiff must establish that defendant's legitimate non-discriminatory reasons were merely pretextual. Plaintiff herein plainly failed to prove pretext.

C. *Respondent Failed to Demonstrate That The Non-discriminatory Reasons Supporting Petitioner's Actions Were a Mere Pretext For Discrimination.*

Once the employer has met the plaintiff's *prima facie* case by articulating a non-discriminatory reason for the personnel action in question, the plaintiff must be afforded an opportunity to demonstrate pretext. As this Court explained in *Burdine:*

> Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's *prima facie* case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

(Slip Opinion at p. 7).

Although given an opportunity to do so, plaintiff presented no evidence that Safeway entered into the Union contract or complied with its terms with discriminatory intent or as a pretext for the particular alleged discrimination against Crespin. Likewise, there is no evidence that Chambers was hired for the carpenter's position for any reason other than the fact that he was the most qualified person for the job. Simply stated, Crespin presented no evidence of Safeway's intent to discriminate against him. No factual basis has ever been established by Crespin that an employer's decision to hire an experienced career carpenter in preference to a weekend hobby carpenter is a pretext for discrimination.

Absent the plaintiff's proof of pretext in this case, there is no basis for finding a Title VII violation. Accordingly, the Court of Appeals' decision is in error.

March, , 1981.

Respectfully submitted,

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APPENDICES

Appendix A	Opinion of Court of Appeals Tenth Circuit
Appendix B	Opinion and Order of the District Court Granting the Claim of Daniel Crespin
Appendix C	Report of Master Concerning the Claim of Daniel Crespin
Appendix D	Order Denying Petition for Rehearing in Court of Appeals

APPENDIX A

Nos. 79-1189, 79-1190.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

SAFEWAY STORES, INCORPORATED,

Defendant-Appellee and Cross-Appellant,

and

Retail Clerks Union, Local No. 7; Butcher Workmen of North America, AFL-CIO, Local No. 634; The International Union of Operating Engineers, Local Union No. 1; Delivery Drivers, Warehousemen and Helpers, Local Union No. 435; Milk Drivers and Dairy Employees Local No. 537; Warehouse and Distribution Employees Union, Local No. 452; Bakery Wagon Drivers and Salesmens Local Union No. 219; and District Lodge No. 86, International Association of Machinists and Aerospace Workers,

Rule 19(a)(2)*Defendants,*

and

DANIEL CRESPIN,

Claimant-Appellant and Cross-Appellee.

Nos. 79-1189, 79-1190.

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

Argued and Submitted May 5, 1980.

Decided Nov. 17, 1980.

In an equal employment opportunity suit, the claimant employee appealed and the employer cross-appealed from judgment of the United States District Court for the

District of Colorado, Sherman G. Finesilver, J. The Court of Appeals, William E. Doyle, Circuit Judge, held that: (1) the trial court erred in fixing the date of entitlement to damages, and should have gone back to date when claimant filed complaint with Equal Employment Opportunity Commission; (2) as individual cannot be deprived in improper manner of that which is actually his, consent decree did not constitute deprivation of remedies due to individual claimant who was not party to consent, and decree did not limit party or power of trial judge to act in accordance with law in granting relief to claimant who had established actionable discrimination in employment; (3) where employer's evidence appeared pretextual after it had been presented, it was unnecessary for claimant to offer evidence in rebuttal; and (4) in view of, inter alia, employer's creation of unlawful impediment, a 15 years' experience requirement, which was used to prevent claimant from being in position to get 1977 assistance job, trial court properly fashioned remedy despite contention of employer that all previous discriminatory aspects of hiring procedures had been eliminated.

Judgment ordered modified as to date of award and as to award of front pay; judgment otherwise affirmed, and cause remanded.

1. Civil Rights — 43

Individual employee who has established prima facie case of discrimination in employment need not present further evidence that reasons articulated by employer to explain alleged discriminatory acts are incredible or pretextual; burden of individual employee does not shift, and it remains with him or her, being risk of nonpersuasion. Civil Rights Act of 1964, § 201 et seq. as amended 42 U.S.C.A. § 2000a et seq.

2. **Civil Rights – 44(1)**

Evidence of conduct on part of employer, culminating in knowing and deliberate failure to give employee chance to join union, established prima facie case of discrimination in employment despite employer's attempted reliance on hiring hall provisions of collective bargaining agreement. Civil Rights Act of 1964 § 201 t seq. as amended 42 U.S.C.A. § 2000a et seq.

3. **Civil Rights – 9.10**

Employer is not allowed to appoint understudy and lock him in, thus covering up violation of equal employment opportunity provisions of Civil Rights Act of 1964. Civil Rights Act of 1964, § 201 et seq. as amended 42 U.S.C.A. § 2000a et seq.

4. **Civil Rights – 46**

Trial court in equal employment opportunity case erred in fixing date of entitlement to damages and should have gone back to date when claimant filed complaint with Equal Employment Opportunity Commission. Civil Rights Act of 1964 § 201 et seq. as amended 42 U.S.C.A. § 2000a et seq.

5. **Civil Rights – 43**

Job applicant, in equal employment opportunity suit, must establish that he or she is qualified in terms of skills and physical strength and finally would have accepted position had it been offered, and that there was available position which was filled by someone else in conformity with discriminatory policy. Civil Rights Act of 1964, § 201 et seq. as amended 42 U.S.C.A. § 2000a et seq.

6. **Federal Civil Procedure – 2397**

As individual cannot be deprived in improper manner of that which is actually his, consent decree did not constitute deprivation of remedies due to individual equal

employment opportunity claimant who was not party to consent, and decree did not limit party or power of trial judge to act in accordance with law in granting relief to claimant who had established actionable discrimination in employment. Civil Rights Act of 1964, § 201 et seq. as amended 42 U.S.C.A. § 2000a et seq.

7. Civil Rights – 44(4)

Employer in equal employment opportunity case failed to articulate reason for failure to instate claimant in carpenter's position in view of fact that primary articulated reason was that claimant was ineligible by reason of not being member of union, and employer kept such requirement from claimant and at same time sought out Caucasian employee. Civil Rights Act of 1964, § 201 et seq. as amended 42 U.S.C.A. § 2000a et seq.

8. Civil Rights – 43

Where, in equal employment opportunity case, employer's evidence appeared pretextual after it had been presented, it was unnecessary for claimant to offer evidence in rebuttal. Civil Rights Act of 1964, § 201 et seq. as amended 42 U.S.C.A. § 2000a et seq.

9. Civil Rights – 40

The 180-day filing requirement was met in equal employment opportunity case where original act of hiring another as assistant was only start of discrimination, and discriminatory act did not become fully apparent until another employee retired, limitation period not beginning until completion of such act. Civil Rights Act of 1964, § 706(d) as amended 42 U.S.C.A. § 2000e-5(e).

10. Civil Rights – 46

In view of, inter alia, employer's creation of unlawful impediment, a 15 years' experience requirement, which was used to prevent claimant from being in position to get 1977

assistance job, trial court properly fashioned remedy despite contention of employer that all previous discriminatory aspects of hiring procedures had been eliminated. Civil Rights Act of 1964, § 201 et seq. as amended 42 U.S.C.A. § 2000a et seq.

11. Civil Rights – 46

Proper remedy in "failure to hire" equal employment opportunity cases is instatement in next available position, and back pay and seniority benefits commensurate therewith are also appropriate, as is compensation until opening occurs. Civil Rights Act of 1964, § 201 et seq. as amended 42 U.S.C.A. § 2000a et seq.

12. Civil Rights – 46

Where equal employment opportunity claimant acted promptly in remaining in employ of defendant, secure in long-term position, there was no duty on his part to seek carpenter position with some other company so as to mitigate damages, and only need for mitigation was in terms of deduction of salary which he had received as warehouse order clerk and forklift operator from damages derived from his not being given carpenter position. Civil Rights Act of 1964, § 201 et seq. as amended 42 U.S.C.A. § 2000a et seq.

Gregory A. Eurich and Deborah J. Friedman, of Holland & Hart, Denver, Colo., for defendant-appellee and cross-appellant.

Paul A. Baca, Denver, Colo., for claimant-appellant and cross-appelee.

Before SETH, BARRETT and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

Introductory Facts and Proceedings

The above captioned cause is brought on behalf of Daniel Crespin, a Spanish surnamed American citizen. The appeal is from the judgment of the United States District Court for the District of Colorado, The Honorable Sherman G. Finesilver, Judge. Safeway Stores has filed a cross-appeal. The case is an employment discrimination action which arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000a et seq. Also involved are the equitable remedies which are available following the report of a special master. As a result of a stipulated submission to the master, two extensive hearings before the special master, followed by a careful review and supplement of the master's reports by the district court, the issue of liability is no longer a question. The question is whether the trial court erred in ruling out the front pay and limiting the back pay which was recommended by the master as a result of the discrimination which was determined to exist.

The evidence established that Crespin was a long time employee of Safeway. His employment dated back to 1962. He was first hired as an order clerk and forklift operator in Safeway's Denver warehouse.

Crespin had had a long time interest in working as a carpenter and as early as 1969 he advised his superintendent of this fact, and told him that this had been his second vocation for a long period of time, and that he wished to transfer to carpentry work in order to obtain a higher paying position. Crespin made his wishes known to several Safeway officials. He was advised by Safeway that a written application was unnecessary, but that he would be considered when the sole carpenter position became vacant. The individual in charge of the carpentry position was Mr. Schlosser, who was the head of the design and construction department. Mr. Schlosser and other Safeway personnel

were notified of Crespin being an applicant for the job. Indeed, a memorandum was written on July 18, 1973. In it the employee relations manager advised Schlosser of the fact. Schlosser responded to the memorandum on July 24, 1973. He stated that Crespin would be considered for the position at the end of 1974, when the current occupant was scheduled to retire.

A carpentry job was filled in March, 1974, long before the occupant of the position retired. A second carpenter, a Caucasian, was hired at the express request of Schlosser. Crespin was given no consideration for the job. Schlosser's reason was that Crespin was not a member of the carpenters' union, a fact of which Schlosser had been aware since 1969, when it became a part of the collective bargaining agreement between Safeway and the carpenters' union. The requirement of the agreement was that the members of the union would receive first opportunity to be referred for filling Safeway's requirements for the carpenter opening.

On November 29, 1974, Crespin filed a complaint with the Equal Employment Opportunity Commission (EEOC). The complaint alleged discrimination.[2] He also commenced work toward a degree of Associate of Arts in Carpentry at a local college. He received straight A's in carpentry and engineering courses.

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[1] The special master, Professor John Phillip Linn, of the University of Denver College of Law, made detailed findings. He found that neither Schlosser, whose duties included the hiring of carpenters, nor any other member of Safeway's management, ever informed Crespin of a requirement of union membership being a prerequisite to his transfer to the carpentry job. The master found it, "reasonably certain that if claimant had been advised (in 1969, when rumors of the company carpenter's retirement were circulating) that the carpenters' union would refer applicants to defendant to fill the carpenter job, claimant would have taken the necessary action to become a union member and to be on the union's referral list."

[2] Crespin's EEOC complaint form, entitled "Charge of Discrimination", initially listed "race or color" as the cause of discrimination, rather than "national origin", a matter of no consequence now

On November 5, 1975, while the Crespin complaint was pending with the EEOC, that body brought a class action naming Safeway Stores as a defendant. Later certain labor unions were added as parties defendant (pursuant to Rule 19[a][2]). Safeway was charged with engaging in unlawful employment practices in its manufacturing, distribution and retail operations in the Denver Metropolitan area. Included in the allaged discriminatory practices were:

> Failure to train Spanish surnamed and Black Americans;
>
> Maintaining terms and conditions of employment which had an adverse effect on Spanish surnamed and Black Americans;
>
> Causing the constructive discharge of Spanish surnamed and Black Americans;
>
> Failure to promote Spanish surnamed Americans.

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being brought to our attention. It listed Safeway as the employer and Schlosser as the employee who discriminated against him. The explanation given by Crespin at that time succinctly summarizes the later findings of the master:

"Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify: 'In 1969 I verbally applied for a carpenter's position for Safeway Stores. At that time, I submitted photos of some of my work. I was told then that the job was filled by a Mr. Nobel. Upon inquiry about the possibility of being an assistant to him I was informed there was no need for one. I was told thereafter that he would retire in a "couple of years". Periodically I kept in touch in regards to the position opening up. Last summer I was told, in writing, I would be considered for the job when Mr. Nobel retired in late 1974. I was refused an interview at that time. Recently, I looked into the matter again and was informed that: 1) Mr. Nobel is retiring; 2) He has had an aide since March, 1974; 3) This aide will take over the job; 4) I would not get the job but if it should open up again I would be considered at that time. I was never informed that a carpenter's aide position had been created. I was never granted an interview, therefore, the company never bothered to find out if I was qualified for the position. I have worked for the company 12½ years. I do carpentry and cabinet work on the side. Attached to this is the company's policy of equal opportunity typed in back of payroll checks recently.

On September 29, 1976, the subject matter or merits of the district court class action was the subject of a consent decree which obviated a trial on most of the issues.[3]

In the consent decree, Safeway promised to henceforth refrain from engaging in stipulated discriminatory practices, and Safeway undertook to henceforth enter into a detailed affirmative action program in its recruitment, hiring, training, retail management training, performance evaluation, promotion, transfer, discharge and discipline practices.

The decree also called for the appointment of a special master to hear and determine the charges of all individual complaints.

Each of the individual complainants, including Crespin, was to receive personal notice that each had the opportunity to submit his or her claim to the master for resolution by the special master in accordance with a specified procedure which called for full hearings, findings of fact, conclusions of law by the master pursuant to federal law by the master pursuant to federal law, and submission of the report of the special master to the district court for approval, modification, or amendment. All of the proceedings looked to the entry following the modification and ultimate approval of the judge of a final appealable judgment. This was all to be subject to the Federal Rules of Civil Procedure.

The consent decree provided further (In Paragraphs G, H and I):

G. With respect to any claim which is sustained by the master, the master shall have the power to order any one or more of the following:

1. To make an award ordering that the charging party be hired or reinstated to the next available

[3]This consent decree has been before this court in three prior cases, our Nos. 78-1136, 78-1137 and 78-1138.

job opening in the facility or department from which the charging party was discharged, constructively or otherwise, or to which the charging party was refused hire.

2. To make an award ordering that the charging party's seniority be adjusted to that seniority which the charging party would have had but for the alleged discrimination.

3. To make an award of back pay.

H. All periods of limitation applicable under federal or state law shall be applied by the master, including limitations on back pay specified in Title VII or otherwise.

I. With respect to any charging party who receives a final award of back pay, the master may also award to said charging party reasonable attorneys' fees incurred in the resolution of the claim, if any.

Crespin elected to submit his claim in accordance with the outlined procedure. On February 7, 1977, following a hearing on the merits, the master found, on October 11, 1977, that due to Crespin's continued efforts over five years to communicate his intense interest in the carpenter position,

> Schlosser's failure to advise claimant of the necessity of union membership and referral for the job of carpenter under all of the circumstances must be viewed as a willful and deliberate omission of managerial duty. Schlosser represented to claimant that no formal job application or interview was necessary because he would remember claimant's interest and consider him. Schlosser represented to management that claimant would be considered to replace Nobel. But when author-

ization for hiring was approved a relatively short time thereafter, Schlosser neither advised claimant of the fact nor considered claimant for the job. Schlosser had lulled claimant into inaction and effectively precluded him from competing for the position.

The Master's Recommendation

The Master's determination was that a violation of Title VII had occurred. His findings were adopted by the district court in its opinion and order granting Crespin relief on his claim. This latter is dated November 16, 1977. The judge added: "Because of Safeway's failure to inform plaintiff of transfer/promotion requirements, he was precluded from consideration for the transfer/promotion." The master was ordered to conduct a further hearing to determine an appropriate remedy.

Prior to this, in June of 1977, Safeway found it necessary to employ a second carpenter. It posted a notice informing its employees of the opening and its requirements, which included not only union membership, but fifteen years experience. Crespin joined the carpenters' union and applied for the job, but was rejected. After that, on March 31, 1978, a second hearing was held before the master. Evidence of the June, 1977 opening was then presented to the master. He issued his report on August 13, 1978. This was filed on August 21, 1978. He found that the person who was responsible for filling the June, 1977 opening was Schlosser, "the same person who had earlier practiced discrimination against claimant and he was subsequently responsible for establishing the requirement of 15 years' experience for the carpenter position." He further found the job was filled by a non-employee, even though the company had a policy of promotion from within. Also, he found that the Safeway defense that a better qualified individual was selected to fill

the opening, was not "legitimate, non-discriminatory and bona fide", citing *Sabol v. Snyder,* 524 F.2d 1009 (10th Cir. 1975).

The master further determined that the 15 years' experience requirement was not necessary to the job, and served no useful purpose to Safeway. "It appears designed to exclude certain qualified carpenters, and under the totality of circumstances of this case, it appears to have been established for no purpose except to deprive claimant of the job he long sought, and was qualified to perform, because of his national origin."

The master's recommendation was that Safeway be directed to promote Crespin to a position in the carpentry shop in a position commensurate with that filled in 1974. His further recommendation was that Crespin be awarded back pay from the time he would have been employed at union carpenter wages, but for the unlawful discrimination, from March 11, 1974 "until the date of his installment in that position by defendant". Safeway was allowed to mitigate this back pay award in the amount of Crespin's interim earnings when employed by Safeway. Also recommended was that Crespin be awarded seniority in his position as of March 11, 1974, and further, that Crespin be allowed costs and attorneys' fees.

The Trial Court's Decision

The trial court agreed entirely with the master's findings of fact, and particularly with the recommendation that Crespin be installed in a carpenter's job. The judge said he could find no distinction between a failure to consider and a failure to hire. The court considered significant the fact that the company had failed to inform Crespin of the necessity for joining the union. Further, the court found that "the record clearly shows that he was fully qualified to do

this job." The trial court noted that Safeway had a policy of promoting from within the organization; that this was brought out by Mr. Schlosser, who was in the forefront of various discriminatory acts. Instatement was declared by the court to be the proper remedy for individual claims such as the one which was being tried, citing *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396. But the court noted, in addition, that it was empowered to grant such relief as was necessary to make the claimant whole; that is to recreate the conditions that would have existed had there been no discrimination.

The court also agreed with the master's recommendation that the claimant was entitled to an award of back pay; however, the back pay award was held by the trial court to be due from June 20, 1977 only. Finally, the court stated that it agreed with the fact that management's repeated failure to inform claimant of the requirement of union membership constituted willful and deliberate discrimination based upon claimant's national origin. However, the court turned around at that very time and in that same paragraph and stated that the next carpenter's job opening was in June, 1977; that this was the first position in which the claimant could have been placed following the 1974 discrimination. We thus have the anomalous situation in which the trial court found that Safeway discriminated against Crespin by denying him a job to which he was entitled in 1974, and nevertheless held that the position opening in 1977 was the first in which claimant could have been placed following the 1974 discrimination. The trial court's conclusion was that the claimant was entitled to an award of back pay and seniority benefits running from June 20, 1977. We reiterate that the 1977 position was the first opening in which the trial court found it could have ordered claimant installed following the 1974 discrimination. Then the court reached its conclusion "upon balancing the fac-

tors in this case in our efforts to be fair and equitable to the parties, we find that claimant is entitled to an award of back pay and seniority benefits since June 20, 1977."

The Master's award had reached a conclusion opposite to that reached by the trial court on the effective date question. The summary of the master's award is contained in his August 13, 1978 opinion and reads as follows:

> In summary, the master believes that claimant is entitled to a carpenter's position in the defendant's carpenter's shop, with seniority and all back pay benefits running forward from March 11, 1974. The back pay to which claimant is entitled is that amount he would have received in the carpenter's position, less the amount he did receive from Safeway for comparable work time, from March 11, 1974, to the date he is instated in the carpenter's job. Claimant is entitled to receive interest on the back pay award at 8% per annum from the date of the final opinion of the court, November 16, 1977, to the time the amount of back pay is actually paid. Colo.Rev.Stat.1973, Secs. 5-12-101, 13-21-101; 28 U.S.C. Sec. 1961. And pursuant to Sec. 706(k) of the Civil Rights Act of 1964, claimant is entitled to costs and attorney's fees in amounts to be determined on receipt of further evidence.

The Contentions of Crespin on Appeal

Crespin maintains that the trial court erred:

1. In determining that the date of commencement back pay remedies and seniority benefits was June 20, 1977 (which was the date Safeway opened a carpenter position). He argues that March 11, 1974, the date that Safeway filled the first opening and rejected him in a discriminatory way is the appropriate date. The trial court determined that the

1977 position was the first carpenter's position open to Crespin following the 1974 act of discrimination.

2. In concluding that "front pay" should not be awarded from the date of judgment, November 22, 1978, until the date that Crespin is installed in a carpenter's position on the ground the consent decree did not allow "front pay" relief to be granted.

The Contentions of Safeway on Cross Appeal

Safeway raises its own issues on cross appeal. It contends that the trial court erred:

1. In failing to give adequate weight to the articulated reasons for failing to hire Crespin for the 1974 carpenter's job opening; that Crespin was not then eligible for the job since he was not a member of the carpenter's union; that this would have been a violation of the hiring hall agreement.

2. In failing to conclude that Crespin did not carry his burden of proof that the reason given by Safeway was a mere pretext.

3. In considering Crespin's charges as having been filed in time to avoid the 180 day filing requirement of Sec. 2000e-5(e).

4. In failing to consider that Safeway allegedly modified its hiring procedures in order to alleviate the necessity for granting any remedy to Crespin.

5. In awarding back pay and reinstatement to a carpenter's job, since these remedies are inappropriate under the circumstances of this case.

6. In failing to join an indispensable party, the carpenter's union, in view of the collective bargaining agreement.

7. In failing to hold that Crespin was required in law to seek a carpenter's job elsewhere in order to mitigate his damages.

I. *Did the Trial Court Err in Determining that the Date of Commencement of the Remedies, Including the Seniority Benefits, to be June 20, 1977, the Date that Safeway created an Assistant Carpenter Position Requiring 15 Years' Experience, Instead of November, 1974, the Date Safeway Filled the Carpenter Position and Promoted Chambers to the Carpenter Position?*

It is unquestionably a violation of Title VII, supra, to refuse employment or promotion on the basis of race or national origin. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

The consent decree which has given rise to this action, while it did not acknowledge any individual violation, nevertheless stated:

> 9. It shall be the burden of the charging party to make an evidentiary showing that he or she is a member of the affected class as defined at Section I., C. 4 herein, and that she or he was not hired or was otherwise adversely affected by personnel action of the company. It shall then be the burden of the company to make an evidentiary showing that the reason for the failure to hire or other adverse personnel action was other than the charging party's membership in the affected class.

The above stipulation of EEOC and Safeway establishes first of all that the individually aggrieved party retains the burden of proof to establish that he is a member of the class and has suffered discrimination. Safeway then has the burden of establishing that the failure to hire was a reason other than membership in the affected class.

So it is not quite the situation of the ordinary lawsuit in which the parties are writing on a clean slate.

[1] We have held, in accordance with generally accepted doctrine, that the articulated reasons for the conduct of a pattern or practice by an employer is a matter for the trier of the facts. *EEOC v. Sandia Corporation,* —— F.2d —— (10th Cir., No. 79-1589, Aug. 13, 1980). Moreover, an individual employee who has established a prima facie case need not present further evidence that the reason articulated by the employer explaining the alleged discriminatory acts are incredible or pretextual. Id. The burden of the individual employee does not shift. It remains with him or her. It is the risk of non-persuasion.

[2] In the case before us Safeway's articulated reason for its failure to hire Crespin the first time around in 1974 (when the then carpenter retired) was that Crespin was not then a member of the carpenters' union. The act of unlawful discrimination grew out of Safeway's knowledge that Crespin was counting on being considered for the job. He had made known his interest to all who would listen and it was the subject of a Safeway inter-office memorandum. With all of that, even though the general manager had assured Crespin that he would be considered, he was not told of the need for joining the union and was not given the slightest consideration. This conduct on the part of Safeway, culminating in failure to give him a chance to join the union, was a knowing and deliberate act. Safeway's attempted reliance on the hiring hall provision of the collective bargaining agreement is, to say the least, hollow. There was sufficient evidence to support the finding of the master that Crespin had established a prima facie case. Safeway did not have a credible explanation.[4]

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[4] Safeway urges at length in its brief that the person hired for the 1974 carpenter's job, a Mr. Chambers, was far more qualified for the job than Crespin. It cites evidence that Chambers had approxi-

[3, 4] In the factual statement set forth above, we brought out the fact that the trial judge not only approved and adopted the special master's findings, but the trial court embraced those findings and made findings of its own that jibed with those of the master. The trial court unequivocally found that Safeway ignored Crespin when the time came to fill the job of the retiring Mr. Nobel in 1974. Safeway, in addition, deliberately misled Crespin by failing to notify him of the fact that he had to be a member of the carpenters' union, and more importantly, failed to notify him that an opening had occurred for which he could apply. The trial judge did not deny that this was a violation of the Act. He sought, however, to render an order he deemed to be a more equitable decision. The reason that was given by the trial court, namely, that no opening existed, in not valid. There was, indeed, an opening; in fact, two openings. An assistant carpenter was appointed prior to Nobel's effective retirement. This assistant, Mr. Chambers, was the heir-apparent to the position. It cannot be said that there was no opening. Otherwise, it would be very easy to evade the Act. All one would have to do would be to appoint an understudy and lock him in. Plainly, this cannot be allowed to be a cover-up of a violation of the Act. And it even more does not excuse the court from the task of fashioning a remedy, in this instance, the award of back pay to the date in November of 1974, when Crespin did not receive the job; when it was given to Chambers. This was the act of discrimination as a result of which Crespin became an ag-

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mately 38 years experience as a carpenter and other skills and accomplishments which, it is alleged, indicate Chambers possessed "immeasurably superior qualifications". The weight which the trier of fact gave to the evidence of these qualifications is not, however, in issue here, since there was evidence that Crespin was also qualified. The trier of fact is the arbiter of the legitimacy and credibility of the articulated reason advanced by the employer for the allegedly discriminatory act. *EEOC v. Sandia Corporation*, supra. See also *Teamsters v. United States*, 431 U.S. 324 at 358, 97 S.Ct. 1843 at 1866, 52 L.Ed.2d 396 (1977).

grieved person entitled to compensation. The master and the trial court were correct in their findings of fact and in general in the application of the standards which were equitable. Both the master and the trial court applied the correct standards with respect to the burden of proof in this type of case. Their findings were, moreover, fully supported by the evidence in the case. However, the trial court erred in fixing the date of entitlement to damages in 1977. It should have gone back to November, 1974.

II. *Did the Trial Court Err in Concluding That Crespin is Not Entitled to So-Called "Front Pay" From the Date of Judgment, November 22, 1978, Until the Date That Crespin Became Installed in the Carpenter's Job?*

[5] The ultimate issue is whether the trial court was correct in denying relief for the reason given, i. e., that it was outside the scope of the consent decree. The Supreme Court has given approval to the concept of an award of "front pay" in discrimination actions. *Franks v. Bowman Transportation, Inc.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444. Also, in *Fitzgerald v. Sirloin Stockade,* 624 F.2d 945 (10th Cir. 1980), this court approved an award of front pay as compensation in lieu of reinstatement. Similarly, in *United States v. Lee Way Motor Freight, Inc.,* 625 F.2d 918, 21 E.P.D. Par. 30,286 (10th Cir. 1979), we ruled that the trial court should, at least consider the question of front pay pending the claimants becoming able to secure their rightful place. The Fourth Circuit, in *Hill v. Western Electric Company, Inc.,* 596 F.2d 99 (4th Cir. 1979), in the opinion of Chief Judge Haynesworth, set forth standards determining entitlement to front pay. The court mentioned that the claimant had the burden of proof that he or she sought a position or would have sought it had not an application been excused in accordance with the *International Brotherhood of Teamsters v. United States,*

supra. The applicant must establish that he or she is qualified in terms of skills and physical strength and finally would have accepted the position had it been offered, and that there was an available position which was filled by someone else in conformity with the discriminatory policy. Certainly these standards are fulfilled in this case. Yet, although the trial court accepted the recommendations of the master that Crespin be awarded front pay or pay from the date of judgment until he is instated in his rightful place, this was rejected upon motion to amend the judgment. The only ground that the trial court cited was that the master lacked authority to make an award of front pay. The conclusion was ill-founded. The master doesn't award anything anyway; the judge does it. See Rule 53, Federal Rules of Civil Procedure. The master merely recommends. It was said, however, that the recommendation of the master was beyond the scope of the consent decree. The district court was not restricted by such consent decree, anyway. It was certainly free to follow the recommendations of the master or act on its own for that matter. An individual cannot be deprived in this manner of that which is rightfully his. See *White v. Carolina Paperboard Corp.*, 564 F.2d 1073 (4th Cir. 1979). In the *White* case the court said about back pay:

> Back pay in Title VII cases may be supplemented, *in the district's court's discretion,* "by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the em-employee can assume his new position" 564 F.2d 1091 (Emphasis added.)

[6] The consent decree, as we view it, undertook to limit the scope of the hearing before the master. It did not, however, constitute a deprivation of remedies due to the individual claimant who was not a party to the consent,

and it certainly did not limit the authority or power of the trial judge to act in accordance with the law. Although the cases discuss the award of front and back as being in the trial court's discretion, the United States Supreme Court has made it clear that this discretion must be exercised so to make possible the fashioning of the most complete relief possible. See *Albemarle Paper Company v. Moody,* 422 U.S. 405 at 421, 95 S.Ct. 2362 at 2373, 45 L.Ed.2d 280 (1975). The consent decree as we view it was to outline the scope of the master's inquiry. It did not serve to limit the trial court's powers in relation to an individual claimant as distinguished from the EEOC against Safeway.

The cause must be remanded for inclusion in the judgment of compensation from the time of the judgment to the date of execution by instatement in a carpenter job, in light of the views expressed above.

Safeway's Points on Appeal

I. *Sufficiency of the Evidence and Alleged Failure of the Court to Give Weight to the Articulated Reasons for Its Failure to Hire Crespin.*

[7] This case was considered in depth by the master in two stages. The first consideration had to do with the evidence in support of the allegations of discrimination, and the second concern was the determination of appropriate remedies. Following intensive hearings before the master the court gave the case in-depth attention. It does not appear that either of these hearers of the facts neglected the articulated reasons of Safeway. The primary articulated reason of Safeway was that Crespin was ineligible because of not being a member of the union, a requirement which Safeway kept from him; at the same time Chambers was sought out by Mr. Schlosser. So this is a grossly inadequate articulated justification. For Safeway to point out the good

qualities of Chambers is, at best, an after-the-fact attempt to justify Schlosser's conduct.

As to the remedies: Both the master and the judge approached the case in the first instance with a view to provide remedies which, to the extent possible, would make Crespin whole. *Albermarle Paper Co. v. Moody,* supra; *Franks v. Bowman Transportation Company, Inc.,* supra. This court also has recognized that once discriminatory conduct has been established with the resulting disregard by an employer of an otherwise qualified employee for promotion or transfer demands remedies which will make the employee whole. *Fitzgerald v. Sirloin Stockade, Inc.,* supra; *Rich v. Martin Marietta Corp.,* 522 F.2d 333 (10th Cir. 1975); See *International Brotherhood of Teamsters v. United States,* supra.

II. *Did the Trial Court Err, as Safeway Argues, in Not Holding as a Matter of Law That the Evidence Presented by Crespin Was Not Sufficient to Sustain the Burden of Proof?*

We must hold that the court did not err. First, evidence was persuasive. This employee was shown by the evidence to have been extraordinarily worthy. He was with Safeway for a number of years, and continues to work there. So he is steadfast. He was constantly seeking to improve himself. He attended the Community College and sought a degree in carpentry and engineering from that institution. Also he made good grades. It would appear that he was unsuspecting that Safeway was misleading him through Schlosser by pretending to take seriously his ambition to gain acceptance as a carpenter.

[8] All the time Schlosser had Mr. Chambers in mind for the job. We have heretofore considered Safeway's articulated reasons for rejecting Crespin, and we agree with the court below that this was unconvincing. So it was un-

necessary for the claimant to take up the cudgel following Safeway's presentation of its evidence, whereas here the Safeway evidence does not make an impact. If the evidence of Safeway appears pretextual after it has been presented, it is unnecessary for the plaintiff to offer evidence in rebuttal.

The main articulated reason given by Safeway for failing to hire Crespin for the carpenter job in 1974 was that he was not a member of the carpenters' union. We need not rehash the point in detail that Safeway, although aware that Crespin was a long-time applicant for the job, did not tell him there was about to be an opening, or that he had to be a member of the carpenters' union. Both of these acts were found to have been discriminatory. See *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972), and cf. *Cedillo v. Ironworkers Local 1*, 603 F.2d 7, 20 E.P.D. Par. 30,135 (7th Cir. 1979). It would have been bad enough if Safeway had refrained from notifying Crespin of the upcoming opening; they had told him that he would be considered for the position when it became open. Safeway offered no reason for this course of conduct. It did not really articulate any reason and, indeed the hiring hall element was not an issue at trial. There was ample evidence in support of the finding that Crespin established a prima facie case. Thus, the McDonnell Douglas procedural formula did not really come into play. Safeway's justification in this court has been that Mr. Chambers was far better qualified than Crespin for the job; that Chambers had approximately 38 years experience as a carpenter; that he had other skills and accomplishments, as well. As to the length of Chambers' service, it must be pointed out that this is subject to the law of diminishing returns, but, in any event, Safeway, in its eagerness to hire Chambers, did not even consider Crespin's qualifications. Chambers had a clear track.

There is no apparent basis then for setting aside the trial court's findings of fact.

III. *Did the Trial Court Err in Not Dismissing the Action as Having Been Untimely Filed in View of the 180-Day Limitation Set Forth in 42 U.S.C., Sec. 2000e-5(e)?*

[9] Neither the master or the trial court reached a conclusion on this issue and undoubtedly this was because Safeway did not press it at trial, although it was raised in a motion to alter or amend judgment. The record does not show that it was an issue at trial. It was raised on the basis of the master's consideration of events occurring before 1970. It should have been raised before the master or with objections to the master's report, and it is difficult considering it here. We do, however, point out that the filing by Crespin was on November 29, 1974. Chambers was hired on March 11, 1974, but this was a hiring of an assistant. Mr. Nobel, the sole carpenter until March 11, 1974, did not retire until November, 1974. It would appear that the original act of hiring Chambers as an assistant was only the start of the discrimination. The final act or culmination of the discrimination was in November, 1974, at which time Nobel took his retirement. It was only then that the discriminatory act became fully apparent. The 180-day requirement was met. The discriminatory act started in March of 1974, and culminated in November, 1974, when Mr. Nobel retired, and Chambers became the full-fledged carpenter. The statute of limitations was not set in motion until the completion of that act.

IV. *Was it Error for the Trial Court, Even Though it Found Liability in Favor of Crespin, to Fashion a Remedy?*

[10] Safeway maintains that no remedy should have been awarded, even if the court did find liability. Safeway

urges that Crespin would be placed in the position which is rightfully his except for the discrimination if he were merely considered for the next opening for a carpenter. Safeway maintains that the only injury that Crespin suffered here resulted from Safeway's failure to advise him of the job requirements. The argument continues that Crespin now is advised of the requirements and thus has achieved his rightful place; all that he is entitled to is consideration. He was considered for the next job opening in 1977, they say, but a better man was chosen. So, Safeway continues, he has had his just due and no further remedy is necessary. They also say that since he filed no further charges with the EEOC after being rejected for the 1977 opening, there was sufficient proof that all previous discriminatory aspects of Safeway's hiring procedures had been eliminated. This argument has no substance. One reason is that Safeway created an unlawful impediment, the 15 years experience requirement, which was used to prevent Crespin from being in the position to get the 1977 assistant's job. Crespin was ruled out because of this newly created requirement. Safeway also ignores the fact that the job requirement was established by the same manager, Schlosser, who was responsible for the original discrimination and subsequent discrimination, as well. The master indicated that the additional requirement of 15 years experience appeared to have been designed to preclude Crespin and hence, was not legitimate and was discriminatory. See *Sabol v. Snyder* supra. All these matters were before the master at the second or remedial phase of the trial.

[11] The trial court, upon receiving the master's report, made its own evaluation of what was needed to remedy the discrimination. In the court's order of November 10, 1978 it made passing mention of the actions of Safeway in establishing an additional discriminatory requirement for the 1977 job, namely, the 15 years experience. It did not distinguish between the failure to consider and failure

to hire, as was urged by Safeway. Rather, it agreed with the master's recommendation that Crespin was to be instated in a carpenter job, was to be awarded back pay and seniority benefits, together with attorneys' fees. The trial court then modified the master's recommendation that the award of back pay and seniority benefits should commence running from June 20, 1977 because the position prior to 1977 was not open. We have already discussed this, and disagreed with this analysis. The proper remedy is instatement in the next available position in "failure to hire" cases. See *Teamsters v. United States,* supra; *Albemarle Paper Co. v. Moody,* supra. Similarly, back pay and seniority benefits commensurate therewith are also appropriate, as is compensation until the opening occurs. *Fitzgerald v. Sirloin Stockade, Inc.,* supra; *United States v. Lee Way Motor Freight, Inc.,* supra.

From what we have said, it is apparent that Safeway's contention that it was error to give any remedy to Crespin is wholly lacking in merit. To accept Safeway's contention would be to hold that Safeway is to receive compensation for changing it ways. No doubt they have received forgiveness in a general way, but the law is not empowered to forgive to the extent of erasing and forgetting an inflicted injury. The aggrieved party is the only one who is so empowered. A clean bill of health is too much for Safeway to expect and Safeway should be reminded that as Emerson so aptly said, "The only reward of virtue is virtue." Safeway is, of course, to be commended for its turn around, and the recognition of the claim of Crespin, which has its origin in another era, in no way detracts from Safeway's changed ways.

V. *Is the Carpenters' Union an Indispensable Party?*

Safeway's position on this is that to order it to hire Crespin as a carpenter would require it to violate its col-

lective bargaining agreement with the union. This contention is, however, now moot because Crespin joined the union once it became apparent that it was appropriate for him to do so. So this point is actually moot at the present time. Moreover, it cannot be said that the union was a party to the discrimination. There is no evidence in the record that says it was, and we are not disposed to speculate on that. cf. *Gilmore v. Kansas City Terminal Railroad Co.*, 509 F.2d 48. In the *Gilmore* case, there was evidence that the union itself had discriminated and the court said that they may have been partially responsible for the absence of minority persons with the requisite training for the supervisory positions that were there involved. The court said that the practices were such that could not be eliminated without the joinder. Such is not in the situation in this case because the practices have all been eliminated, so we are told.

VI. *Did the Court Err in Holding that Crespin was not Compelled, in Order to Mitigate Damages, to Seek a Carpenter Position With Some Other Company?*

[12] We conclude that this point is also lacking in merit. The master's recommendation was that reasonable diligence would not require claimant to have sought employment elsewhere. He remained in the employ of defendant, secure in a long-term position. Such conduct was prudent under the circumstances. The trial court agreed with this. It noted that Crespin had over 12 years service at Safeway, in 1974, and that there was no evidence that full-time carpentry work was available in 1974 outside of Safeway. The evidence showed that he had acceptance as a steady worker at Safeway, and so the kind of mitigation Safeway seeks to impose is not relevant. The trial court recognized the need for mitigation in terms of deduction of Crespin's salary as a warehouse order clerk and forklift operator

from the damages derived from his not being given the carpenter position, and this is the extent of the mitigation that is appropriate.

With the exceptions above noted, that is modification by the trial court of the date of the award to November, 1974, together with the award of front pay pending the obtaining of a carpenter position by Crespin, the judgment is affirmed. The cause is remanded for the purpose of modification of the award in accordance with the foregoing opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 75-F-1184

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED,

Defendant,

and

RETAIL CLERKS UNION, LOCAL NO. 7; BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL NO. 634; THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 1; DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 435; MILK DRIVERS AND DAIRY EMPLOYEES LOCAL NO. 537; WAREHOUSE AND DISTRIBUTION EMPLOYEES UNION, LOCAL NO. 452; BAKERY WAGON DRIVERS AND SALESMENS LOCAL UNION NO. 219; and DISTRICT LODGES NO. 86 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Rule 19(a)(2)
Defendants.

OPINION AND ORDER GRANTING THE CLAIM OF DANIEL L. CRESPIN

THIS MATTER arises out of a Consent Decree entered on September 29, 1976 between Plaintiff EEOC and Defendants. That decree was the result of a Complaint filed on November 5, 1975 in which Safeway Stores was charged with violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e *et seq*. On December 24, 1975, Plaintiff filed an Amended Complaint to add certain labor unions as Rule 19(a)(2) Defendants. Other unions were later added by Stipulation.

The Amended Complaint alleges that Safeway, in its manufacturing, distribution and retail operations in the Denver Metropolitan Area, has engaged in certain unlawful employment practices. It is claimed in the Amended Complaint that those practices have an adverse, illegal impact on Spanish-surnamed Americans and Black Americans. In order to resolve the subject matter of the action, the parties entered into the September 29, 1976, Consent Decree.

Section XII of the Consent Decree concerns resolution of specific claims of discrimination made against Safeway. It was ordered by the Court, with the agreement of the parties, that each person who had previously filed a charge of discrimination could have that claim resolved either through normal EEOC procedures or through a special master procedure established in the decree. The special master procedure includes the following:* (1) court appointment of a master; (2) voluntary submission of the charge of discrimination to the master for hearing; (3) availability of EEOC counsel to represent the charging party before the master and before this court; (4) formal hearings with the procedures to follow that of the Federal Rules of Civil Procedure; (5) optional submission of post-hearing briefs; (6) submission of the master's report to the court for review of findings of fact, conclusions of law, and recommendations; (7) optional submission to this court of objections to the findings of the master; and (8) entry of the judgment of the court on the individual claims.

The latter two procedures includes the following:

> The parties shall have twenty days from the date of receipt of said findings in which to submit to the Court objections to the findings of the master. Said objections may go to the admissibility of evidence; to the sufficiency of the evidence to support any particular finding; or that a material fact not made a part of the findings is supported

> by the evidence without contest or contradiction. [|] Also within twenty days of receipt of the findings, parties may make motions on questions of law to the Court. Said motions shall be in writing and shall designate whether or not the movant desires a hearing on said motion. . . . [|] Once the findings of the master have been submitted to the Court and the parties as provided herein, the Court may, on the motion or objection of either party, or on its own motion, alter, amend, modify or otherwise change the findings of the master. . . . [|] Once judgment of the court is entered . . . either party may proceed in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure for purposes of appeal, including the filing of a motion for new trial.

Under The Federal Rules of Civil Procedure, as well as under the terms of the Consent Decree, the court is to "accept the Master's findings of fact unless clearly erroneous." Rule 53(e)(2), Fed. R. Civ. P.; *United States v. 79.95 Acres of Land,* 459 F.2d 185 (10th Cir. 1972). "(W)here a Master has been appointed under Rule 53(e) his findings should not be disturbed merely because the trial court is of a different opinion or dissatisfied with the Master's findings." *Leader Clothing Co. v. Fidelity & Cas. Co.,* 237 F.2d 7 (10th Cir. 1956) at 11. If, however, the findings are clearly erroneous the court may modify, reject, recommit the report, or the court may itself receive further evidence. Rule 53 (e) (2), Fed. R. Civ. P. Any conclusions of law contained in the report, unlike findings of fact, carry no weight with the Court. *Clark v. Atlanta Newspaper, Inc.,* 366 F. Supp. 886, 890 (D. Ga. 1973).

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*This is, of course, a summary. For a detailed statement of the procedure the Consent Decree should be consulted.

Having reviewed the background of this claim, we now turn to the particular charge of discrimination brought by claimant Daniel L. Crespin. Claimant charges that Safeway discriminated against him on the basis of national origin when it failed to inform him of requirements for transfer and, thereafter, failed to consider him for promotion for lack of qualifications. Defendant Safeway argues that it did not unlawfully discriminate against claimant. We have reviewed the record filed with this court, including the briefs and exhibits filed with the master. The findings contained in the master's report are complete, articulate and supported by the record of testimony. The court commends the master for the thoroughness of his report and the professional way in which he assumed his responsibility to the court and the parties. The master's findings are not clearly erroneous and we adopt them.* Adopting those findings, it is the court's view that claimant has established an unrefuted prima facie case of unlawful discrimination and that defendant Safeway is liable to claimant for whatever relief is appropriate.

The master found that claimant repeatedly informed Safeway officials that he was interested in being transferred into the company's only carpentry position. Claimant's requests began in 1969 and continued through 1974, when an Anglo was hired into the then vacant position. Although claimant was told that he would be considered for the job when it became available, *in fact he was not considered because he was not a member of a particular union.* During the relevant time period, claimant had a second job performing non-union carpentry. Had claimant been informed

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*Those findings are contained in the master's report concerning the claim of Daniel Crespin, filed with the court on October 11, 1977 and served on the parties. A copy of that report is attached to this opinion. "[W]here the court adopts the findings of a master it need not go through the formality of recopying them. . . ." 5A *Moore's Federal Practice* ¶53.12[3] at 3005.

of the union membership requirement for the Safeway position he would have joined the union as early as 1969. This would have given him five years seniority in the union, and, if thereafter requested by Safeway, a near guarantee of carpentry employment with defendant.

Under the procedures established in the Consent Decree the charging party must fulfill the burden of establishing that he is a member of the affected class as defined in the Decree. In this case the parties have stipulated that claimant falls within the definition of the affected class. Claimant must also prove that he was adversely affected by the personnel action of the company. Claimant has met that burden. Because of Safeway's failure to inform plaintiff of transfer/promotion requirements he was precluded from consideration for the transfer/promotion.

At least two Circuit Courts of Appeal have held that failure to inform present employees of qualifications necessary for advancement or transfer constitutes evidence of violation of Title VII. Rowe v. General Motors Corp. 457 F.2d 348, 359 (5th Cr. 1972); *Senter v. General Motors,* 532 F.2d 511, 528 (6th Cir. 1976). *We hold that claimant here met the evidentiary burdens established in the Consent Decree for proof of a prima facie case of discrimination.*

The next step under the Decree is for the defendant to show that the reason for the adverse personnel action was something other than membership in the affected class. Safeway has failed to meet this burden. What the company has proven is that claimant did not qualify for the carpentry job because of his lack of union membership. However, this does not meet the question presented in the claim. The very reason that claimant failed to meet the union membership requirement is because, despite some five years of contacts with Safeway management, he was not once informed of it.

Having found that Safeway failed to show that its personnel inaction in this case was not the result of claimant's minority status, we conclude that Safeway did violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq*.. The claim is referred to the master for further proceedings and recommendations or an appropriate remedy.

ORDER

The court adopts the findings of fact filed by the master with the Clerk of the Court on October 11, 1977.

The court concludes that as to this claim, Safeway Stores, Incorporated discriminated against claimant, Daniel L. Crespin, in violation of 42 U.S.C. §§2000e *et seq*. The master is directed to set a hearing in which an appropriate remedy can be developed with appropriate recommendation to the court. The master's file is to be forwarded to the master.

DATED at Denver, Colorado, this 16th day of November, 1977.

BY THE COURT:
SHERMAN G. FINESILVER, Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 75-F-1184

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED,

Defendant,

and

RETAIL CLERKS UNION, LOCAL NO. 7; BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL NO. 634; THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 1; DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 435; MILK DRIVERS AND DAIRY EMPLOYEES LOCAL NO. 537; WAREHOUSE AND DISTRIBUTION EMPLOYEES UNION, LOCAL NO. 452; BAKERY WAGON DRIVERS AND SALESMENS LOCAL UNION NO. 219; and DISTRICT LODGE NO. 86 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Rule 19(a)(2)
Defendants.

REPORT OF MASTER CONCERNING THE CLAIM OF DANIEL CRESPIN

Paul A. Baca, Esq., Denver, Colorado, for Claimant Daniel Crespin.

Gregory A. Eurich, Esq., (Holland & Hart), Denver, Colorado, for Defendant Safeway Stores, Incorporated.

No appearance for the union defendants.

This matter arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq*. The master was appointed by the Honorable Sherman G. Finesilver, District Judge of the United States District Court for the District of Colorado, pursuant to a consent decree entered into between plaintiff and defendants in September, 1976.

The appointment was made in accordance with Fed.R.Civ. P. 53.

Claimant Daniel L. Crespin, a Spanish surnamed American, claims that because of his national origin he was deprived of his rights to equal employment opportunity as guaranteed by Title VII of the Civil Rights Act of 1964, as amended, by defendant's failure to inform him of the requisites of the job to which he sought a transfer, and by defendant's failure to consider him for that job.

Claimant has been employed continuously by defendant since 1962 as an order selector and fork lift operator. As a second job, claimant has performed non-union carpentry work for many years.

In 1969, claimant first advised Norm Scherzer, superintendent of defendant's distribution center, of his desire to transfer to a carpenter position. Defendant then employed a single carpenter in its design and construction department. Claimant provided Scherzer with numerous photographs of some of his carpentry work. Scherzer informed claimant that James Schlosser, manager of the design and construction department, was responsible for filling the carpenter position. Scherzer allegedly sent the photographs, together with a letter explaining claimant's interest in the carpenter job, to Schlosser.

Thereafter, claimant attempted to contact Schlosser on several occasions to personally express his continuing interest in becoming a carpenter for defendant and to complete any formal application or personal interview for the job. In a 1970 telephone conversation with Schlosser, claimant was told that no one would be considered for the carpenter job until Mr. Nobel, the then employed carpenter, retired. Schlosser stated that no written application for the job or personal interview was necessary. Schlosser assured claimant that he would remember the claimant's interest when it came time to fill the carpenter position.

Additionally, claimant advised Max Garcia, defendant's affirmative action director, and Gordon Delaney, employee relations manager at the distribution center, of his interest in becoming a carpenter. By memorandum dated 7-18-73, Mr. Delaney advised Schlosser, Scherzer, personnel department manager Kimball, and division manager and vice president Eldon Starkey of claimant's desire to be considered for the carpenter position, and expressed understanding that Nobel would retire in 1973 or 1974. Schlosser responded in writing to the memorandum on 7-24-73, stating that Nobel would retire at the end of 1974 and that Schlosser would consider claimant for the job.

In early 1974, Schlosser convinced his superior that Nobel's replacement should be hired before Nobel's retirement date for training purposes. Schlosser gave no consideration to claimant for the carpenter position on the ground that he knew claimant was not a member of the carpenter's union and defendant was required, under the terms of a collective agreement with the Carpenters District Council of Denver and Vicinity, to give the union first opportunity to refer qualified carpenters to fill any carpenter position with defendant. Schlosser had known of this contract requirement since 1968, but neither he nor any other member of management ever advised claimant of that requirement. Schlosser also knew from 1969 forward that claimant was not a member of the carpenters' union.

It had been rumored *in 1969,* when claimant first indicated interest in the carpenter position that Nobel was leaving the position. *It is reasonably certain that if claimant had been advised then that the carpenters' union would refer applicants to defendant to fill the carpenter job that claimant would have taken the necessary action to become a union member and to be on the union's referral list.*

In March, 1974, Schlosser hired Joseph Chambers, a Caucasian carpenter, who was a union carpenter working

for a subcontractor engaged by defendant. Schlosser wanted to hire Chambers. When this fact was made known to Chambers, the latter so advised the union and the union placed Chambers on its referral list and sent him to defendant for hire.

Nobel retired in November, 1974 at which time Chambers became the sole carpenter in the employ of defendant.

Defendant makes no contention that claimant lacked the skill or ability to perform the work required of its carpenter which consists primarily of building minor fixtures and doing maintenance or repair work in existing stores.

Defendant introduced testimony to establish that one other Caucasian, not an employee of defendant, had expressed interest in the carpenter position to Schlosser but had been advised that because he was not a union carpenter he could not be considered for the job. Further, defendant introduced statistical evidence concerning its employment of minorities.

There does not appear to be a reported decision on the issue of whether discrimination exists in failure to apprise a minority applicant for a particular job of the requirements for the job. Cases dealing with peripherally related issues, such as union referral systems and word-of-mouth recruitment, address those matters in light of adjudicated discrimination. *U.S. v. Operating Engineers,* 476 F.2d 1201 (7th Cir. 1973) ;*Pettway v. American Cast Iron Pipe,* 494 F.2d 211 (5th Cir. 1974) ;*U.S. v. Georgia Power,* 474 F.2d 906 (5th Cir. 1973) ; *Barnett v. W.T. Grant,* 518 F.2d 543 (4th Cir. 1975) ; *Long v. Sapp,* 502 F.2d 34 (5th Cir. 1974) . It appears necessary, therefore, to explore the function of disclosure of job information and the relevance of disclosure to the meaning of Title VII legislation. The intent basic to the Civil Rights Act is to provide equal opportunity for employment to all persons. Failure to *dis-*

close the full range of prerequisites denies to a qualified or qualifiable individual an equal opportunity to prepare for or successfully apply for a position. It defeats the essential purpose of Title VII and is contrary to sound industrial relations practice which is *to disseminate all bona fide requisites for job openings in order to attract a pool of qualified applicants from which to choose the individual best suited to the particular position.*

The foregoing is not to say that defendant, in the absence of adjudicated discrimination, must publicize every opening. *Gresham v. Chambers,* 501 F.2d 687 (2d Cir. 1974). There is an important distinction to be made, however, between publicizing to the world an available position and fully disclosing the particulars of that position to those individuals the company knows to be interestd in competing for the position. In *Lea v. Cone Mills,* 438 F.2d 86 (4th Cir. 1976) the court enjoined the failure of the employer to notify job applicants of the necessity of renewing applications every two weeks but would order public recruitment only on a showing of statistical disparity. In *Rowe v. General Motors,* 457 F.2d 348 (5th Cir. 1972), the court found that the failure of a company to notify all employees of promotional opportunities to be a significant factor in discrimination. *The effect of the failure here to notify claimant of job requirements equally precluded his opportunity to compete for the position and is no less objectionable than the actions in Rowe or Cone Mills.*

Here claimant continued over a period of five years to communicate his intense interest in the carpenter position to defendant. He provided photographs of his work and made an unusual effort to inform defendant's management representatives of his technical skills and job interest. Schlosser's failure to advise claimant of the necessity of union membership and referral for the job of carpenter under all of the circumstances must be viewed as a

willful and deliberate omission of managerial duty. Schlosser represented to claimant that no formal job application or interview was necessary because he would remember claimant's interest and consider him. Schlosser represented to management that claimant would be considered to replace Nobel. But when authorization for hiring was approved a relatively short time thereafter, Schlosser neither advised claimant of the fact nor considered claimant for the job. Schlosser had lulled claimant into inaction and effectively *precluded him from competing for the position.*

On this record, the inference is unmistakable that defendant acted discriminatorily in violation of claimant's rights as claimant alleges. Defendant has shown no legitimate business justification for its conduct.

Given this finding of discrimination in violation of Title VII of the Civil Rights Act of 1964, the case will be set for hearing to determine the appropriate remedy.

JOHN PHILLIP LINN, Master

APPENDIX D

NOVEMBER TERM – DECEMBER 17, 1980

Before The Honorable Oliver Seth, Chief Circuit Judge, The Honorable James E. Barrett, Circuit Judge, and The Honorable William E. Doyle, Circuit Judge

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

SAFEWAY STORES, INC.,
Defendant - Appellee,

DENVER RETAIL GROCERS & RETAIL CLERKS UNION LOCAL NO. 7; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO LOCAL NO. 634; THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 1; DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 435; MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION NO. 537; WAREHOUSE AND DISTRIBUTION EMPLOYEES UNION LOCAL UNION NO. 452,
Rule 19(a)(2)*Defendants,*

DANIEL CRESPIN,
Claimant - Appellant.

Nos. 79-1189
79-1190

(D.C. No. 75-F-1184)

This matter comes on for consideration appellant's (cross-appellee) petition for rehearing filed in the captioned causes.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS
Clerk

No. 80-1587

In the

Supreme Court of the United States

OCTOBER TERM, 1980

SAFEWAY STORES, INC.,

Petitioner,

v.

DANIEL CRESPIN,

Respondent.

BRIEF IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PAUL A. BACA
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No. 80-1587

In the

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SAFEWAY STORES, INC.,

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BRIEF IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

1. Whether the burden of the Petitioner is that which is contained in the Consent Decree which it voluntarily agreed to with the Equal Employment Opportunity Commission, namely, to "make an evidentiary showing," rather than solely to explain, non-discriminatory reasons for its decision to hire someone other than the Respondent.

2. If the burden outlined in the Consent Decree is not enforceable, whether the evidentiary burden applied by the Court of Appeals is consistent with this Court's decision in *Texas Department of Community Affairs v. Burdine*, ... U.S. ..... (No. 79-1764, decided March 4, 1981) which allows the employer to explain rather than prove non-discriminatory reasons for its decision to hire someone other than the Respondent.

LIST OF PARTIES

1. The Petitioner is Safeway Stores, Incorporated, a Maryland corporation with its principal place of business in Oakland, California[1].

2. The Respondent is Daniel Crespin of Denver, Colorado.

3. In the trial court, the Equal Employment Opportunity Commission was the named plaintiff and certain labor unions were named as party defendants under Rule 19(a)(2) of the Federal Rules of Civil Procedure. However, neither the EEOC nor the labor unions participated in the proceedings below and they are not parties to this proceeding. The following is a complete list of the Rule 19(a)(2) defendants:

> Retail Clerks Union, Local No. 7
>
> Butcher Workmen of North America, AFL-CIO, Local No. 634
>
> The International Union of Operating Engineers, Local No. 1
>
> Delivery Drivers, Warehousemen and Helpers, Local Union No. 435
>
> Milk Drivers and Dairy Employees Local No. 537
>
> Warehouse and Distribution Employees Union, Local No. 452
>
> Bakery Wagon Drivers and Salesmens Local Union No. 219
>
> District Lodge No. 86, International Association of Machinists and Aerospace Workers

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[1]Safeway has no subsidiaries or affiliates.

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No. 80-1587

In the

Supreme Court of the United States

OCTOBER TERM, 1980

SAFEWAY STORES, INC.,

Petitioner,

v.

DANIEL CRESPIN,

Respondent.

BRIEF IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Daniel Crespin hereby respectfully submits his brief in opposition to the Petition of Safeway Stores, Incorporated requesting a writ of certiorari to review the decision in this action rendered by the United States Court of Appeals for the Tenth Circuit and requests that this Court deny the writ.

STATEMENT OF THE CASE

In its Petition the Petitioner, Safeway Stores, Incorporated ("Safeway"), has divided its representation of the statement of the case into two sections — "Proceedings Below" and "Statement of the Facts". The section labeled "Proceedings Below" correctly outlines the history of this case below and the Respondent Daniel Crespin ("Crespin") accepts same as outlined in the Petition. Regarding

the section labeled "Statement of the Facts" Crespin accepts same with the exceptions noted below.

At page 4 of the Petition Safeway suggests that the nature of the carpenter's duties were somehow of a highly specialized nature suggesting the need of considerable experience as a carpenter. Crespin submits that this representation by Safeway is not accurate in that the duties of the carpenter were routine in nature involving basic carpentry tasks such as building minor fixtures and doing general maintenance work. Crespin's contention is supported by the evidence in the record and the master and trial court so found in their findings of facts which remained undisturbed by the Court of Appeals on review.

At page 5 of the Petition Safeway characterizes Crespin's carpentry experience as a hobby. Crespin contends that his ultimate career goal was employment as a carpenter with Safeway and the record reflects that carpentry provided Crespin with a source of supplemental income for a number of years and that he pursued formal training in the field of carpentry in an effort to achieve this ultimate career goal.

Finally, at page 5 of the Petition Safeway indicates that Crespin has not alleged that the hiring of a second carpenter by Safeway in June of 1977 was in any way discrimination. Technically, this may be correct since no separate judicial complaint was filed raising such a claim. However, testimony and exhibits were received by the master regarding the filling of this second position at the time of the subsequent remedial hearing because of their probative value to the issues involved in the case.

REASONS FOR DENYING THE WRIT

I. SAFEWAY AGREED TO ITS BURDEN IN THE CONSENT DECREE WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND THE COURT OF APPEALS CORRECTLY INTERPRETED THE BURDEN AGREED TO IN THE CONSENT DECREE.

As indicated in Safeway's statement of the Case, Safeway entered into a Consent Decree with the Equal Employment Opportunity Commission ("EEOC") on September 29, 1976 settling the class action lawsuit brought against it by the EEOC. The Consent Decree set forth the hearing procedures and burdens of proof to be applied to any individual claims of discrimination by the members of the affected class. Paragraph XII, F., 9., of the Consent Decree provided as follows:

> It shall be the burden of the charging party to make an evidentiary showing that he or she is a member of the affected class as defined at Section I., C.4 herein, and that she or he was not hired or was otherwise adversely affected by personnel action of the company. It shall then be the burden of the company *to make an evidentiary showing* that the reason for the failure to hire or other adverse personnel action was other than the charging party's membership in the affected class. (Emphasis added).

Safeway voluntarily agreed to the standard of its burden by entering into the Consent Decree. Voluntary agreements are permissible so long as they are not violative of the purposes for which Title VII was enacted. See *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

Pursuant to the Consent Decree Safeway agreed that its burden was "to make an evidentiary showing that the

reason for the failure to hire or other adverse personnel action was other than the charging party's membership in the affected class'' in order to rebut a prima facie case of discrimination by the individual charging party. The phrase ''to make an evidentiary showing'' implies more than simply offering a legitimate explanation. The Tenth Circuit in interpreting this phrase to mean ''establishing that the failure to hire was a reason other than membership in the affected class'' was not interpreting the employer's burden as defined by this Court in *McDonnell-Douglas* and its progeny but the burden which Safeway voluntarily placed upon itself. The Tenth Circuit's interpretation of this phrase is not erroneous and to so hold would be tantamount to approving Safeway's attempt to abrogate the terms of its voluntary agreement with the EEOC.

II. THE COURT OF APPEALS HOLDING IN THIS CASE IS IN HARMONY WITH THIS COURT'S DECISION IN *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS v. BURDINE*, (No. 79-1764, March 4, 1981).

A. The Court of Appeals Did Not Place a Burden Upon the Employer Which Was More Onerous Than Required by *Texas Department of Community Affairs v. Burdine* (No. 79-1764, March 4, 1981).

Despite the fact, as correctly stated in Safeway's Petition, that the Tenth Circuit did not have the benefit of this Court's opinion in *Texas Department of Community Affairs v. Burdine*, ... U.S. ..... (No. 79-1764, argued December 9, 1980, decided March 4, 1981), its holding is nevertheless consistent with *Burdine*. Safeway does not contend that Crespin failed to establish a prima facie case as required by *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 1973), but instead, that the Tenth Circuit

placed a burden upon it more onerous than required by *Burdine*. As noted above, Safeway decided prior to the case at bar what its burden was to be. However, assuming arguendo that Safeway's self-imposed burden was not enforceable, the Tenth Circuit's holding is still consistent with *Burdine*.

In order to properly analyze this issue, it is necessary to look beyond the holding of the Tenth Circuit to the underlying findings made by the district court. Crespin's claim was heard by a master appointed by the district court pursuant to the provisions of the above-referenced Consent Decree entered into by Safeway and the EEOC. Subsequent to the hearing on the liability phase of Crespin's claim, the master filed a report with the district court on October 11, 1977 making various recommended findings. The district adopted, entirely, the findings recommenced by the master by Opinion and Order dated November 16, 1977.

In his report to the district court the master found, among other things, that Crespin had indicated to Safeway, on numerous occasions, his intense interest in the carpenter position for a period in excess of five years and that the James Schlosser, the management official responsible for filling the carpenter position, was aware of Crespin's desires and of the requirement of membership in the carpenter's union for appointment to the position. More importantly, the master found that Schlosser willfully and deliberately failed to advise Crespin of the union membership requirement thereby precluding him from effectively competing for the position and that Safeway offered no legitimate explanation for this conduct. These findings remained undisturbed on appeal. With these findings clearly in mind, it can now be ascertained whether or not the burden "placed" upon Safeway was the correct one.

Burdine represents the third clarification from this Court of the test first expressed in *McDonnell-Douglas*. In

McDonnell-Douglas, supra, at 802, this Court established the applicable rules as to the burden of proof in a Title VII case as follows:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications . . . .
>
> The burden then must shift to the employer to articulate some *legitimate,* non-discriminatory reason for the employee's rejection. (Emphasis added).

As noted above, Safeway does not contend that Crespin failed to establish the prima facie case as required by *McDonnell-Douglas.* As a result of proving his prima facie case, Crespin has raised an inference of discrimination because, if unexplained, his rejection was, more likely than not, based upon the consideration of impermissible factors. See *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, at 358 n. 44 (1977). Therefore, the inquiry must focus upon whether or not Safeway met Crespin's prima facie case of discrimination.

In *Furnco Construction Co. v. Waters,* 438 U.S. 567 1978) this Court reaffirmed the employer's burden under *McDonnell-Douglas* at 578:

> When the prima facie case is understood in the light of the opinion in McDonnell-Douglas, it is apparent that the burden which shifts to the

> employer is merely that of proving that he based his employment decision on a *legitimate* consideration, and not an illegitimate one such as race. (Emphasis added).

In *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1979) this Court, again, addressed the matter of the employer's burden at 25:

> While words such as "articulate," "show," and "prove," may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some *legitimate,* nondiscriminatory reason" and "prov[ing] absence of discriminatory motive." By reaffirming and emphasizing the McDonnell-Douglas analysis in Furnco Construction Co. v. Waters, supra, we made it clear that the former will suffice to meet the employee's prima facie case of discrimination. (Emphasis added).

Finally, in *Burdine,* this Court reaffirmed, for the third time, the employer's burden under *McDonnell-Douglas*:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a *legitimate,* nondiscriminatory reason. (Emphasis added).

(Slip Opinion at p. 6).

The common thread that runs through *McDonnell-Douglas* and its progeny is that the reason proferred by the employer must be a legitimate one to successfully meet the employee's prima facie case of discrimination. The le-

gitimacy of the reason articulated by the employer is a matter to be determined by the trier-of-fact. See *EEOC v. Sandia* Corporation, ... F.2d ....., 23 EPD ¶31,175 (10th Cir. 1980). Whatever the finding of the trier-of-fact may be, it should not be disturbed upon review unless it is clearly erroneous leaving the reviewing court with a definite and firm conviction that a mistake had been committed. See *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The findings of the master and the district court that Safeway failed to demonstrate the legitimacy of its articulated reason were, correctly, left undisturbed by the Tenth Circuit because they were not "clearly erroneous." Safeway failed to offer an explanation as to why it did not inform Crespin of the membership requirement despite several inquiries by him over a period of five years. Instead, Safeway offered the "explanations" that Crespin was rejected because he was not a member of the union and the selectee was more qualified. Such explanations, in the factual setting as we have here, do not rise to the level of being legitimate and the master and courts below correctly so found. This result is, without a doubt, consistent with *Burdine* and the decisions rendered by this Court prior thereto.

B. *The Court of Appeals Did Not Ignore Safeway's Explanations of the Reasons for Its Actions.*

Safeway's offered reasons for its actions were that it was bound by contractual obligations not to hire Crespin because of his lack of union membership and that it hired a more qualified applicant. Crespin will not here rehash his arguments set forth in paragraph II, A. above since the offered reasons were not legitimate. However, it should be pointed out here that the master found to a reasonable degree of certainty that had Crespin been advised of the union membership requirement he would have taken the necessary steps to become a union member and be placed on the

union's referral list. This finding was adopted by the district court and remained undisturbed on review because it was not clearly erroneous. In fact, it is interesting to note that Crespin took these very steps to make himself eligible when a second position became available in June of 1977. See Tenth Circuit opinion at 634 F.2d at 1278.

C. *The Court of Appeals Did Not Assume the Existence of Discrimination Because Safeway Entered Into the Consent Decree with the EEOC.*

Safeway suggests that somehow the Court of Appeals ignored Safeway's "explanations" because it had prejudged this matter due to the fact that Safeway entered into the Consent Decree with the EEOC. As support for this contention Safeway offers the following portion of the Tenth Circuit's opinion: "So it is not quite the situation of the ordinary lawsuit in which the parties are writing on a clean slate." 634 F.2d at 1280. This quotation is clearly taken out of context in which it was made by the Tenth Circuit. It is quite apparent, as this Court will see, that this statement was made in reference to the procedural and burden of proof considerations because of the fact that this claim was heard under the provisions of a consent decree as opposed to the more common circumstance where the claim arises out of a separate and independent lawsuit.

D. *Crespin Was Not, Under the Circumstances of this Case, Required to Offer Evidence That Safeway's Reasons Were a Mere Pretext for Discrimination.*

As indicated above Safeway failed to sustain its burden of offering a legitimate explanation for its actions. Therefore, Crespin was not required to offer anything further. This would be comparable to the example given by this Court in *Burdine* where the Court stated:

> Establishment of the prima facie case in effect creates the presumption that the employer unlaw-

> fully discriminated against the employee. If the trier-of-fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment of the plaintiff because no issue of fact remains in the case.

(Slip Opinion at pp. 5-6).

In the case at bar, Safeway's "explanations" are tantamount to silence thereby obviating Crespin's obligation to offer anything further. It is the risk of non-presuasion.

Respectfully submitted,

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